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DATO' DR MOHAMAD RAMEEZ YAHAYA v. LEMBAGA TATATERTIB PERKHIDMATAN AWAM KUMPULAN PENGURUSAN (NO 1) & ANOR

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
B SURAYA OTHMAN JCA
LAU BEE LAN JCA
[CIVIL APPEAL NO: W-01(A)-275-05-2019]
11 AUGUST 2020

C ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Public service – Application to quash decisions of Disciplinary Board ('DB') and/or Disciplinary Appeal Board ('DAB') – Public officer charged and found guilty of misconduct – DB pronounced punishment of reduction of three salary scales for period of 36 months ('first decision') – Public officer appealed to DAB against first decision – DAB* D *remitted matter back to DB for re-consideration without setting aside first decision – DB re-pronounced same punishment and decision affirmed by DAB – Whether first punishment remained in force and still subsisted – Whether there was real likelihood that may be predisposed to affirm sentence that had not been set aside – Whether failure of DAB to set aside first punishment amounted to procedural* E *impropriety – Whether procedural impropriety tainted proceedings of misconduct – Whether caused prejudice to public officer – Whether decisions of DB and/or DAB ought to be quashed – Rules of Court 2012, O. 53*

ADMINISTRATIVE LAW: *Public officer – Disciplinary proceedings – Application for judicial review by public officer to quash decisions of Disciplinary* F *Board ('DB') and/or Disciplinary Appeal Board ('DAB') – Public officer charged and found guilty of misconduct – Disciplinary Board ('DB') pronounced punishment of reduction of three salary scales for period of 36 months ('first decision') – Public officer appealed to Disciplinary Appeal Board ('DAB') against first decision – DAB remitted matter back to DB for re-consideration without setting aside first decision* G *– DB re-pronounced same punishment and decision affirmed by DAB – Two proceedings by DB on same charge – Effective date of punishment not stated – Whether there was certainty in effective date of implementation and duration of punishment – Whether prejudicial to public officer considering severity of punishment – Whether decisions tainted with procedural impropriety – Whether decisions of DB and/or DAB ought to be quashed – Rules of Court 2012, O. 53*

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The appellant was an Administrative and Diplomatic Officer and the Director of the Department of Policy Planning and Coordination, Ministry of Foreign Affairs. The appellant was issued with a show cause letter which contained two charges of misconduct, namely for his actions while serving I at the office of the Consulate General of Malaysia ('CGM') in Melbourne, Australia between 2011 and 2015. The applicant had allegedly appointed (i) his nephew as a driver, which was a conflict between personal interest and public duties ('first charge'); and (ii) Southbank Office Fitout and Furniture

to carry works and renovations at the CGM's office in Australia even though the company was not shortlisted for consideration by the Jawatankuasa Perumahan Perwakilan ('committee') and the committee, chaired by the appellant, appointed IRM Interiors Pty Ltd to carry the works, in contravention of para. 170.3(a) of the Treasury Instruction which stipulates that a decision on such tenders must be made by a committee appointed in writing with a composition of at least three persons ('second charge'). The Disciplinary Board for the Managerial Group (No. 1) ('first respondent') found the appellant guilty of both charges and imposed on the appellant, the punishment of reduction of three salary scales for a period of 36 months in respect of both charges ('first respondent's decision dated 12 April 2016'). Dissatisfied, the appellant appealed against the first respondent's decision to the Disciplinary Appeal Board, Public Service Commission ('second respondent'). The second respondent set aside the finding of guilt and punishment regarding the first charge but remitted the matter regarding the second charge, without setting aside the same, to the first respondent for re-consideration. Upon re-consideration, the first respondent found the appellant guilty of the second charge and imposed the same punishment of reduction of three salary scales for a period of 36 months ('first respondent's decision dated 6 April 2017'). The first respondent's decision dated 6 April 2017 was affirmed by the second respondent. The appellant commenced an application for judicial review, at the High Court, pursuant to O. 53 of the Rules of Court 2012 ('ROC'), seeking, *inter alia*, orders of *certiorari* to quash the decisions of the first and/or second respondents on the grounds that the respondent's decision-making process were tainted with illegalities, irrationalities and/or procedural improprieties. The High Court dismissed the application. Hence, the present appeal. In support of his appeal, the appellant submitted that there were procedural improprieties in the failure of (i) the second respondent to provide clarity on the status of the punishment imposed in the first respondent's decision dated 12 April 2016 when the second respondent remitted the second charge back to the first respondent for re-consideration. Consequently, the punishment imposed in the first respondent's decision dated 12 April 2016 was still subsisting when the second charge was re-considered by the first respondent; and (ii) the first respondent to state the effective date of punishment of reduction of three salary scales for 36 months.

Held (allowing appeal; granting orders of *certiorari* to quash decisions of respondents)

Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The failure of the second respondent to set aside the first respondent's decision dated 12 April 2016 was clearly a procedural impropriety that resulted in grave prejudice to the appellant. Since the second respondent failed to set aside the punishment in the first respondent's decision dated 12 April 2016 when the second charge was remitted back to the first

respondent for re-consideration, in effect, the said punishment remained in force and still subsisted while the second charge was being 're-considered' by the first respondent and the same punishment was meted out in the first respondent's decision dated 6 April 2017. Therefore, the impartiality and integrity of the first respondent's subsequent proceedings for re-consideration was clearly compromised as it raised the spectre of bias by the decision-maker as there was a real likelihood that it may be predisposed to affirm a sentence that had not been set aside. The implications of the failure of the second respondent to set aside the punishment was serious and the omission was a serious procedural impropriety that had tainted the proceedings of the first respondent and could not lawfully be maintained by the second respondent in its decision to affirm the decision of the first respondent. (paras 29, 30 & 32)

(2) The first respondent failed to state the effective date of punishment of reduction of three salary scales for 36 months. Certainty in the effective date of implementation and duration of punishment meted out is a legitimate procedural expectation of the appellant and a necessary trait of a fair decision-making process. It could not be the case where a punishment is pronounced without an effective date as that would be akin to having the proverbial sword of Damocles hanging over the appellant's head, waiting for its fall whenever the relevant authorities deem fit. The nature of the punishment imposed, which specified a minimum period of 12 months and a maximum period of 36 months, makes it imperative that there be certainty in the effective date of punishment in order to comply with the express terms of the Public Officers (Conduct and Discipline) Regulations 1993. There were two proceedings by the first respondent on the second charge, *ie,* on 12 April 2016 and 6 April 2017. There were also two commencement dates of punishment imposed in respect of the same punishment and the same charge. In effect and in practical terms, the appellant was subjected to two punishments for the same charge. The consequences were highly prejudicial for the appellant as the punishment pertained to three scales of reduction in salary for 36 months. The failure of the respondents to specify an effective date of the said punishment had led to wrongful deductions to the appellant's salary. (paras 33-36, 48 & 51)

Case(s) referred to:

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Owi Cheng Ian v. Suruhanjaya Pasukan Polis Diraja Malaysia & Ors [2014] 8 CLJ 559 CA ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(1), 7(1)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(b), 37A, 41(1)(c), (2)
Rules of Court 2012, O. 53

For the appellant - Ismail Badiuzzaman, Shahidan Baharom & Farah Helmy; M/s Ismail Badiuzzaman & Assocs
For the respondents - Kogilambigai Muthusamy & Liew Horng Bin; SFCs

[Editor's note: For the High Court judgment, please see Dato' Dr Mohamad Rameez Yahaya v. Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) & Anor [2019] 1 LNS 1027 (overruled).]

Reported by Najib Tamby

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal by the appellant/applicant against the decision of the High Court at Kuala Lumpur, delivered on 15 May 2019 which dismissed the applicant's judicial review application under O. 53 of the Rules of Court 2012 (ROC 2012) seeking *inter alia* the following reliefs:

(i) an order of *certiorari* to quash the decision of the Disciplinary Board for the Managerial Group (No. 1) ("Disciplinary Board") dated 6 April 2017, which found the applicant guilty of a disciplinary misconduct and imposed the punishment of a salary reduction of three salary scales for a period of 36 months; and/or

(ii) an order of *certiorari* to quash the decision of the Disciplinary Appeal Board, Public Service Commission ("Disciplinary Appeal Board") dated 19 March 2018 which affirmed the decision of the Disciplinary Board on 6 April 2017.

Background Facts

[2] The narration of the salient facts is derived from the learned judge's "judgment", with suitable modifications.

[3] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[4] The applicant is an Administrative and Diplomatic Officer ("Pegawai Tadbir dan Diplomatik") and the Director of Jabatan Perancangan Dasar dan Penyelarasan, Ministry of Foreign Affairs, Wisma Putra, Putrajaya.

[5] Prior to his current position, the applicant was serving at the office of the Consulate General of Malaysia in Melbourne, Australia from 26 June 2011 to 11 September 2015. He was then posted to Chile as Malaysia's ambassador until 2018 when he was transferred back to Malaysia to hold the current position.

[6] By a letter dated 29 September 2015, the applicant was issued a show cause letter which contained two charges of misconduct as follows:

Pertuduhan Pertama

Bahawa Y.Bhg. Dato' Dr. Mohamad Rameez Yahaya, No. Kad Pengenalan 690804-08-6489, Pegawai Tadbir dan Diplomatik Gred M54, Duta Besar Malaysia ke Chile, Kementerian Luar Negeri semasa bertugas sebagai Pegawai Tadbir dan Diplomatik Gred M54, Konsul Jeneral, Konsulat Jeneral Malaysia di Melbourne, Australia, Kementerian Luar Negeri, mulai 26 Jun 2011 hingga 11 September 2015 telah melantik sepupu Y.Bhg. Dato' iaitu Mohamad Azian Bin Abdul Rasheed, No. Passport A 24905656 sebagai pemandu bagi Konsulat Jeneral Malaysia di Melbourne, Australia bagi tempoh satu (1) tahun bermula dari 14 November 2011 sehingga 13 November 2012 melalui kontrak yang dibuat pada 1 November 2011.

Perbuatan Y.Bhg. Dato' tersebut bertentangan dengan perkara 1.1 Pekeliling Perkhidmatan Pentadbiran Bilangan 4 Tahun 1981, Kementerian Luar Negeri yang menyatakan:

Sekiranya sesuatu kekosongan tidak dapat diisikan oleh warganegara tempatan atau asing yang bermastautin dengan sah di sesuatu tempat, warganegara Malaysia bolehlah dilantik dengan syarat mendapat kelulusan bertulis terlebih dahulu daripada Kementerian. Semasa mengemukakan cadangan ini pihak perwakilan adalah dipinta menyertakan satu surat akuan ditandatangani oleh Ketua Canseri yang mengesahkan:

(i) Warganegara tersebut bukan saudara mara mana-mana pegawai atau perwakilan.

Perbuatan Y.Bhg. Dato' juga boleh ditafsirkan sebagai menyebabkan kepentingan peribadi bercanggah dengan tugas awam iaitu melanggar peraturan 4.2 (b) P.U. (A) 395/1993 yang menyatakan seperti berikut:

4(2) Seseorang pegawai tidak boleh:

(b) berkelakuan dengan sedemikian cara yang mungkin menyebabkan kepentingan peribadinya bercanggah dengan tugas awamnya.

Pertuduhan Kedua

Bahawa Y.Bhg. Dato' Dr. Mohamad Rameez Yahaya, No. Kad Pengenalan 690804-08-6489, Pegawai Tadbir dan Diplomatik Gred M54, Duta Besar Malaysia ke Chile, Kementerian Luar Negeri semasa bertugas sebagai Pegawai Tadbir dan Diplomatik Gred M54, Konsul Jeneral, Konsulat Jeneral Malaysia di Melbourne, Australia Kementerian Luar

Negeri, mulai 26 Jun 2011 hingga 11 September 2015 telah melantik syarikat Southbank Office Fitout and Furniture untuk menjalankan kerja-kerja Fit-Out dan ubahsuai pejabat Konsulat General Malaysia di Melbourne, Australia melalui surat bertarikh 28 Oktober 2011 sedangkan Mesyuarat Jawatankuasa Perumahan Perwakilan (JKPP) MALAWAKIL Melbourne, pada mesyuarat bertarikh 10 Oktober 2011 yang dipengerusikan oleh Y.Bhg. Dato' sendiri, telah memilih Syarikat IRM Interiors PTY LTD untuk menjalankan kerja-kerja tersebut dan syarikat Southbank Office Fitout and Furniture bukan salah satu daripada syarikat yang tersenarai untuk pertimbangan mesyuarat.

Perbuatan Y.Bhg. Dato' tersebut melanggar Arahan Perbendaharaan 170.3 (a) yang menyatakan:

170.3 Perlantikan Dan Keputusan Jawatankuasa Sebut Harga

(a) Keputusan mengenai sebut harga hendaklah dibuat oleh satu Jawatankuasa yang dilantik secara bertulis oleh Pegawai Pegawai dengan keahlian sekurang-kurangnya tiga (3) orang …

Perbuatan Y.Bhg. Dato' juga boleh ditafsirkan sebagai kurang cekap atau kurang berusaha serta tidak bertanggungjawab iaitu melanggar peraturan 4.2 (e) dengan (g) P.U (A) 395/1993 seperti berikut:

4(2) Seseorang pegawai tidak boleh:

(e) kurang cekap dan kurang berusaha; dan

(g) tidak bertanggungjawab.

Jika Y.Bhg. Dato' didapati bersalah atas pertuduhan di atas, Y.Bhg. Dato' boleh dikenakan mana-mana satu atau apa-apa gabungan dua atau lebih hukuman yang dinyatakan dalam peraturan 38 P.U. (A) 395/1993 selain daripada hukuman buang kerja atau turun pangkat.

[7] In essence, the first charge relates to the appointment of a nephew of the applicant as a driver at the Consulate General Malaysia in Melbourne Australia, for a period of one year commencing 14 November 2011 until 13 November 2012, by a contract dated 1 November 2011, wherein such appointment of a relative was in contravention of art. 1.1 of the Pekeliling Perkhidmatan Pentadbiran Bil. 4 of 1981, which action can be interpreted as causing a conflict between personal interest and public duties, which is in contravention of reg. 4.2(b) of the Public Officers (Conduct and Discipline) Regulations 1993 (P.U(A) 395/1993).

[8] The second charge (the charge relevant to the instant appeal) relates to the applicant's action in the appointment of Southbank Office Fitout and Furniture ("Southbank") to carry fit-out works and renovation works at the Consulate General of Malaysia's office in Melbourne, Australia by a letter dated 28 October 2011, even though Southbank was not shortlisted for the committee's consideration and the committee, Jawatankuasa Perumahan Perwakilan (JKPP) MALAWAKIL, Melbourne, which was chaired by the

applicant had, on 10 October 2011 appointed IRM Interiors Pty Ltd to carry out the said works. The applicant's action was in contravention of para. 170.3(a) of the Treasury Instruction which stipulates that a decision on such tenders must be made by a committee appointed in writing with a composition of at least three persons.

[9] In response to the two charges against him, the applicant, by a letter dated 19 October 2015 filed a representation to the first respondent in defence of his conduct. In respect of the second charge, the applicant's representation may be summarised as follows:

(i) Southbank Office Fitout and Furniture and IRM Interiors Pty Ltd are the same company;

(ii) The name of both companies above-mentioned appear in the same letterhead as can be seen from the invoice sent to the applicant's office; and

(iii) the costs, specifications and quotations between both companies abovementioned were the same.

[10] By a letter dated 10 May 2016, the first respondent informed the applicant that the first respondent in its meeting on 12 April 2016, had found the applicant guilty on both charges and imposed on the applicant, the punishment of reduction of three salary scales for a period of 36 months in respect of both charges.

[11] The applicant thereafter, on 2 June 2016, filed an appeal against the said decision to the second respondent.

[12] By a letter dated 20 December 2016, the second respondent informed the applicant that having considered the applicant's appeal at a meeting on 5 December 2016, the second respondent had decided as follows:

(i) in respect of the first charge, to set aside the finding of guilt and punishment by the first respondent; and

(ii) in respect of the second charge, to remit the matter back to the first respondent for re-consideration.

[13] The first respondent proceeded to reconsider the second charge against the applicant and informed the applicant of its decision by letter dated 17 May 2017, that pursuant to its decision dated 6 April 2017, the first respondent found the applicant guilty of the second charge and imposed the following punishment: "turun gaji sebanyak tiga pergerakan untuk tempoh 36 bulan" (salary reduction of three salary scales for a period of 36 months).

[14] By a letter dated 12 June 2017, the applicant forwarded an appeal against the first respondent's decision in respect of the second charge to the second respondent.

[15] On 19 March 2018, the second respondent affirmed the decision of the first respondent and informed the applicant by a letter dated 22 May 2018.

Applicant's Judicial Review Application

Applicant's Submissions

[16] The applicant's primary grounds in his application for judicial review may be summarised as follows:

(i) The respondents' decision-making process were tainted with illegalities, irrationalities and/or procedural improprieties as the second respondent had failed to state its reasons or to give proper directions in remitting the second charge back to the first respondent for re-consideration.

(ii) The respondents' decision is illegal, irrational and tainted with procedural impropriety as the first respondent has failed to constitute a different quorum to re-consider the second charge to avoid biasness or infringement of principles of natural justice.

(iii) The reason given by the second respondent in remitting the second charge to be re-considered by the first respondent is unreasonable, doubtful and not supported by documentary evidence.

(iv) The second respondent had failed to inform the applicant the reasons why the second charge was remitted back to the first respondent for re-consideration. This infringed the *audi alteram partem* principle.

(v) The failure of the first and second respondents to state the effective date of punishment on the second charge is fatal.

(vi) The respondents have failed to give effect to the true meaning and intent of "Arahan Perbendaharaan 170" in making its decisions.

(vii) The respondents have failed to take into account that both Southbank Office Fitout and Furniture and IRM Interiors Pty Ltd. are *de facto* the same company.

(viii) The first respondent had failed to form an investigation committee to re-consider the second charge, in particular to ascertain whether the two companies above-mentioned are the same entity.

Respondents' Submissions

[17] The respondent's submissions may be summarised as follows:

(i) The issue on the composition of the first respondent when the second charge was remitted to the first respondent for re-consideration was not pleaded and therefore, should not be considered by the court.

(ii) There is no requirement in law for the first respondent to specify the effective date of punishment ie, the reduction of three salary scales for a period of 36 months as reg. 41(2) of Public Officers (Conduct and Discipline) Regulations 1993 provides that if no date of punishment is specified, the effective date would be the date the punishment is imposed.

(iii) There is no requirement in law for the first respondent to request a new representation from the applicant in order to reconsider the second charge which was remitted back to the first respondent for re-consideration.

(iv) There is no legal duty on the first respondent and the second respondent to give reasons for the decisions made.

(v) There is no requirement in law for the first respondent to inform the applicant of his right of appeal to the second respondent.

(vi) The non-establishment of an investigation committee is not irrational in the circumstances of the instant case.

Findings And Decision Of The High Court

[18] The learned judge had dismissed the applicant's judicial review application. The grounds for dismissal are as follows:

(i) The respondents had raised a preliminary issue that the decision by the first respondent on 6 April 2017 is not a final decision which is amenable to judicial review. The learned judge agreed with the respondents and stated as follows (in paras. 20 to 22 of his "judgment"):

> Reverting to the present case, it is not disputed that the respondents' decision on 10.5.2016 was appeal against to the 2nd respondent. Thereafter, the 2nd respondent has decided on 5.12.2016 to set aside the finding of guilt for the 1st charge and remitted back the 2nd charge to the 1st respondent for re-consideration. Having considered the 2nd charge again, on 6.4.2017 the 1st respondent found that the applicant is guilty of the said 2nd charge. This decision was again appealed to the 2nd respondent which eventually was affirmed on 19.3.2018.
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> Based on the above-mentioned facts, clearly the final decision that adversely affects the Applicant is the 2nd Respondent's decision on 19.3.2018 and not the 1st Respondent's decision on 6.4.2017 as it was still under appeal at the material time.
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> In the circumstances, the 1st Respondent's decision is not subject to a judicial review.

(ii) There is no statutory requirement for the second respondent to give its reasons or to give any directions pertaining to its decision to remit the second charge back to the first respondent for re-consideration.

(iii) The reason to remit back the second charge to be re-considered by the first respondent had been given which is due to the existence of a discrepancy with regard to the punishment for the first charge imposed by the first respondent. In the record of proceedings, it states that the punishment imposed on the first charge is a "warning". However, in the first respondent's letter to the applicant dated 10 May 2016, it states the punishment is the reduction of three scales of salary for 36 months.

(iv) The failure of the second respondent to state the effective date of punishment on the second charge is not fatal as reg. 41(2) of the Public Officers (Conduct and Discipline) Regulations 1993 provides that if no date is specified, the punishment shall be implemented "on the date the punishment is imposed". As such, the punishment of the three scales of reduction of the applicant's salary for 36 months imposed by the first respondent was on 6 April 2017.

(v) The implementation and execution of the first respondent's decision in respect of the second charge, which was affirmed by the second respondent is the function of the Public Service Department and the related Ministry.

(vi) There is no evidence to support the applicant's contention that the punishment of reduction of three salary scales for 36 months would result in the imposition of more than 36 months as imposed by the first respondent on the 6 April 2017 and affirmed by the second respondent on 19 March 2018. The learned judge added as follows:

> Clearly the authority has to make the necessary adjustment to comply with the said decision and any irregularity, if at all exist, does not affects the validity of the said decision.

(vii) The second respondent had considered the detailed facts in relation to the second charge and the representation by the applicant and arrived at the finding that the applicant's conduct in appointing Southbank Office Fitout and Furniture without going through the Jawatankuasa Sebut Harga had clearly infringed the para. 170.3(a) of the Treasury Instruction. In the instant case the committee, Jawatankuasa Perumahan Perwakilan (JKPP), MALAWAKIL, Melbourne had earlier on 10 October 2011 appointed IRM Interiors Pty Ltd to carry out the fit-out and renovation works at the General Consulate Office, Melbourne.

(viii) The issue of the composition of the first respondent in order to avoid biasness when the second charge was remitted back to the first respondent to be re-considered was neither pleaded nor raised in the applicant's affidavit-in-support. As such, the same issue of composition of the first respondent to hear the second charge is untenable. The learned judge stated (in para. 57 of the "judgment") as follows:

> In any event, as alluded to earlier, the reason for the 2nd charge been remitted back to the 1st respondent for consideration only relates to the discrepancy of the punishment with regard to the 1st charge which has been dismissed by the 2nd respondent. Hence there is no bias in this regard on the part of the 1st respondent and also it does not prejudice the applicant.

(ix) Regulation 37A of the Public Officers (Conduct and Discipline) Regulations 1993 clearly provides that an investigation committee can be formed if the Disciplinary Committee thinks it is necessary, which is not in the present case. Hence, the issue of failure to form an investigation committee is also untenable.

[19] Based on the above reasons, the learned judge concluded that the second respondent's decision to remit the second charge to the first respondent and subsequently affirming the first respondent's decision in respect of the second charge is not tainted with any illegality, irrationality or procedural impropriety.

Grounds Of Appeal

[20] The primary grounds raised by the applicant in the memorandum of appeal may be summarised as follows:

(i) The learned judge had erred in his decision that the first respondent's decision on 6 April 2017 is not subject to judicial review, as the application for judicial review commenced from the decision of the first respondent to the subsequent decision of the second respondent, including the punishment imposed.

(ii) The learned judge had erred in his decision that there is no duty on the second respondent to give reasons or specific directions to the first respondent when the second respondent decided to remit the second charge to the first respondent on 5 December 2016 for re-consideration. There was uncertainty as to whether the punishment imposed by the first respondent on 6 April 2017 in the first proceedings were set aside or were still in force.

(iii) The learned judge had erred in the failure to establish an investigation committee and this constitutes a breach of the *audi alteram partem* rule.

(iv) The learned judge had erred in fact and law in failing to consider the meaning of "illegality", "irrationality", and "procedural impropriety" when there existed a clear discrepancy with regard to the punishment for the first charge imposed by the first respondent as stated in the letter informing the applicant of the first respondent's decision, and as stated in the second respondent's affidavit where the punishment was reduction of three scales of salary for 36 months for the first and second charge. However, in the affidavit of the first respondent, it states that the punishment imposed on the first charge is a "warning", while the punishment on the second charge is the reduction of three scales of salary for 36 months.

(v) The learned judge had erred in his decision that the issue of the composition of the first respondent to re-consider the second charge was not subject to judicial review as the same had not been pleaded by the applicant.

(vi) The learned judge had erred in his failure to make a decision on what was the effective date of punishment to be implemented on the applicant. In essence, the learned judge failed to consider there were two dates on which the same punishment of reduction of three salary scales was imposed. The punishment imposed on 12 April 2016 and the same punishment imposed by the first respondent on re-consideration dated 6 April 2017. This renders the punishment defective.

(vii) The learned judge had erred in his finding that the date of implementation of the punishment against the applicant in respect of the second charge was on the 6 April 2017 whereas the punishment was enforced against the applicant much earlier on the 12 April 2016. This resulted in the duration of the punishment to be extended beyond 36 months to 48 months. This is in contravention of art. 5(1) and art. 7(1) of the Federal Constitution.

(viii) The learned judge had erred in his finding that the applicant was in breach of para. 170.3(a) of the Treasury Instruction when the applicant appointed Southbank Office Fitout and Furniture instead of IRM Interiors Pty Ltd for fit-out and renovation works at the Consulate General Office in Melbourne, Australia. The learned judge had failed to consider that Southbank Office Fitout and Furniture and IRM Interiors Pty Ltd are owned by the same individual at all material times and both companies had maintained the same quotation in respect of the proposed fit-out and renovation works and that the two companies above-mentioned differ in name only.

Our Decision

[21] After careful consideration of learned counsels' written and oral submissions as well as the appeal records, we were of the unanimous view that there were merits in this appeal that warrant appellate intervention. We therefore allowed this appeal with costs and set aside the order of the High Court. We give our reasons below.

[22] The grounds for judicial review have been clearly and succinctly enunciated by Lord Diplock in the landmark decision of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 and cited with approval by the Federal Court in the recent case of *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561 at pp. 583 to 584, stated as follows:

> Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" ...
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can now succinctly be referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[23] Recent cases have also endorsed the above-mentioned position that the current state of law on judicial review in Malaysia permits a review of both process and merit. (See *Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).

[24] While the appellant has listed numerous grounds of appeal in his "memorandum rayuan", during the oral submissions before us, the focus of the arguments raised by learned counsels pertain to alleged procedural improprieties arising from the punishment imposed by the first respondent and affirmed by the second respondent on the second charge ie, reduction of three salary scales for 36 months. It is to be noted that the arguments centred not on the punishment *per se* but primarily on two interrelated issues: first, the legal implications of the uncertainty in respect of the status of the punishment when the second respondent remitted the second charge to the first respondent for re-consideration and second, the uncertainty in respect of the effective date of punishment on the second charge and consequences arising from the implementation thereof. Taking the cue from learned counsels, we therefore propose to address the above-mentioned issues only in our judgment. In our considered opinion, the determination of the issues above-mentioned are sufficient to dispose of this appeal.

First Issue

Failure To Set Aside The Punishment On The Second Charge

[25] The first issue raised by the applicant was that there was a procedural impropriety in the failure of the second respondent to provide clarity on the status of the punishment imposed by the first respondent in the earlier proceedings when the second respondent remitted the second charge back to the first respondent for re-consideration. In consequence thereof, the punishment imposed by the first respondent on 12 April 2016 in the first proceedings was still subsisting when the second charge was reconsidered by the first respondent, and the decision to affirm the same punishment in the subsequent proceedings was made by the first respondent on 6 April 2017. This was alleged to be highly prejudicial to the applicant.

[26] From the affidavit of YBhg Tan Sri Arpah binti Abdul Razak affirmed on behalf of the second respondent, the reason the second respondent had remitted the second charge back to the first respondent for re-consideration was due to a discrepancy in punishment on the two charges between what was stated in the first respondent's record of proceedings and what was conveyed by the first respondent to the applicant by letter dated 20 December 2016. The above-mentioned discrepancy was also admitted by learned Federal Counsel in the hearing before us.

[27] In the affidavit of the first respondent, it states that the punishment imposed on the first charge is a "warning", while the punishment on the second charge is the reduction of three scales of salary for 36 months. However, the first respondent had stated in the letter dated 20 December 2016 to the applicant, that the decision of the first respondent in respect of the first and second charges was punishment of reduction of three scales of

A salary for 36 months. The applicant was also informed that the second respondent will remit the second charge back to the first respondent for re-consideration. The relevant portion of the above-mentioned letter is reproduced below:

> (i) mengakas keputusan dan hukuman Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No. 1) dan membebaskan YBhg. Dato Dr. bagi pertuduhan pertama; dan
>
> (iv) menghantar balik kes kepada Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No. 1) untuk ditimbang semula bagi Pertuduhan Kedua.

[28] However, there was no mention in the above-mentioned letter that consequential to the second charge being remitted back to the first respondent for re-consideration, the punishment imposed on the second charge in the earlier proceedings before the first respondent would be set aside.

[29] While we do not question the decision of the second respondent to remit the second charge back to the first respondent for re-consideration, we are however of the considered view that the failure of the second respondent to set aside the punishment of reduction of three salary scales for 36 months on the 2nd charge that was meted out by the first respondent in the earlier proceedings on 12 April 2016, was clearly a procedural impropriety that had resulted in grave prejudice to the applicant, as demonstrated below.

[30] First, the first decision by the first respondent to impose the punishment to reduce the applicant's salary by three scales for 36 months on the second charge was made on 12 April 2016. Since the second respondent had failed to set aside the punishment of the same when the second respondent remitted back the second charge to the first respondent for re-consideration, in effect, the said punishment remained in force. The applicant tendered documentary evidence to show that the punishment of reduction in salary by three salary scales was implemented consequential to the decision of the first respondent on 12 April 2016, and had not been set aside when the second respondent remitted back the second charge to be re-considered by the first respondent. This means that the punishment meted out in the earlier proceedings on 12 April 2016 still subsists while the second charge was being "re-considered", by the first respondent, and the same punishment was decided by the first respondent on 6 April 2017. Thus, the impartiality and integrity of the first respondent's subsequent proceedings for re-consideration is clearly compromised as it raises the spectre of bias by the decision maker, as there is a real likelihood that he may be predisposed to affirm a sentence that had not been set aside.

[31] In addition, the implementation of the punishment consequential to the first respondent's decision on 12 April 2016 in the earlier proceedings has resulted in financial consequences to the applicant's livelihood as the applicant asserts that to date there has been no reimbursement of outstanding salary, bonus allowances and other benefits that should be due to the applicant. No evidence to the contrary has been tendered by the respondents.

[32] The implications of the failure of the second respondent to set aside the punishment above-stated is serious indeed. Thus, in our view, this omission by the second respondent to set aside the punishment by the first respondent when the second charge was remitted back to the first respondent for re-consideration is a serious procedural impropriety that has tainted the proceedings of the first respondent and cannot lawfully be maintained by the second respondent in its decision to affirm the decision of the first respondent on 19 March 2018.

Second Issue

Failure To State Effective Date Of Punishment

[33] The second procedural impropriety is the failure of the first respondent to state the effective date of punishment of reduction of three salary scales for 36 months. Certainty in the effective date of implementation and duration of punishment meted out is a legitimate procedural expectation of the applicant and a necessary trait of a fair decision-making process. It cannot be the case where a punishment is pronounced without an effective date as that would be akin to having the proverbial sword of Damocles hanging over the applicant's head, waiting for its fall whenever the relevant authorities deem fit.

[34] It is also worthy of note that the nature of the punishment imposed, which specifies a minimum period of 12 months and a maximum period of 36 months, makes it imperative that there be certainty in the effective date of punishment in order to comply with the express terms of the Regulations. The punishment imposed on the applicant on the second charge was pursuant to reg. 41(1)(c) of the Public Officers (Conduct And Discipline) Regulations 1993 which is reproduced below:

> **Reduction of salary**
>
> 41(1) ... the appropriate Disciplinary Authority may impose a punishment of reduction of salary on an officer in accordance with the following provisions:
>
> (a) …
>
> (b) …
>
> (c) **the duration of the punishment shall not be less than twelve months but shall not be more than thirty-six months on any one occasion.** (emphasis added)

[35] The undisputed facts in the instant case were that there were two proceedings by the first respondent on the second charge, *albeit* both proceedings had led to the same punishment. The first proceedings before the first respondent led to the decision to impose the punishment on the 12 April 2016. The second proceedings (on re-consideration) by the first respondent led to a decision of the same punishment on 6 April 2017. The first respondent's decision on 6 April 2017 was affirmed by the second respondent on the 19 March 2018. It stands to reason that there cannot be two different dates of the commencement of the same punishment on the same charge ie, 12 April 2016 and 6 April 2017 against the same person, the applicant in the instant case. This underscores the earlier issue raised that the punishment meted out to the applicant in the earlier proceedings ought to have been set aside as a consequence of remitting the second charge back to the first respondent for re-consideration.

[36] In addition, the consequences are also highly prejudicial for the applicant as the punishment pertains to three scales of reduction in salary for 36 months. The contention of the applicant is that since the punishment of salary deduction was implemented from the decision on 12 April 2016 and had not been set aside when the second charge was remitted for re-consideration, and the same sentence was imposed on 6 April 2017, the effect is that the duration of the punishment would exceed the maximum 36 months stipulated by the reg. 41(1). This is an irrefutable inference arising from the implementation of two punishments at two separate times. A punishment is only lawful if it is implemented in strict compliance with the express provisions of the law. Regulation 41(1) above expressly stipulates the minimum and maximum punishment of salary reduction that can be imposed. Any sentence which cannot be lawfully maintained is therefore invalid and renders the proceedings null and void.

[37] We note that the learned judge did not make a decisive finding on the legal implications arising from the uncertainty in respect of the effective date of punishment and there was a lack of judicial appreciation thereof. The learned judge had in fact conceded the possibility that the applicant's salary may have been deducted wrongfully, but agreed with the respondent that, if at all, it was an irregularity and not fatal to the decision. In this respect, we strongly disagree with the view expressed by the learned judge that it is an administrative matter in which financial "necessary adjustment" may be made by the relevant authority. His Lordship had stated (at para. 41) as follows:

> Clearly the authority has to make the necessary adjustment to comply with the said decision and any irregularity, if at all exist does not affects the validity of the said decision.

[38] The irrefutable inference to be drawn from the excessive salary deductions from the applicant, is either that the punishment had been implemented before its effective date or the punishment as implemented had exceeded the maximum duration stipulated by reg. 41(1). Either way, the implementation of the punishment is both erroneous and unlawful. These wrongful salary deductions carry serious legal implications and can by no means be treated as an "irregularity" that can be easily rectified by "adjustment" of proper salaries due to the applicant by the relevant authorities.

[39] Learned Federal Counsel also contended that there is no necessity to state an effective date of punishment because the Public Officers (Conduct and Discipline) Regulations 1993 provides that in the event the Disciplinary Authority did not stipulate a date for the implementation of the punishment, the date of the implementation would be on the date the punishment is imposed. Reference was made to reg. 41(2) which states as follows:

> 41(2) The punishment of reduction of salary imposed on an officer shall be implemented on the date as specified by the appropriate Disciplinary Authority or if no date is specified, on the date the punishment is imposed.

[40] A literal construction of reg. 41(2) above-mentioned where an effective date of punishment, if not stated may be construed as the date of decision would, in ordinary circumstances not give rise to any uncertainty as there would ordinarily be only one decision date. The facts of the instant case however, differ in that there were two dates of decision which imposed the same punishment. The first respondent's decision on 12 April 2016 and on re-consideration, the first respondent's decision on 6 April 2017. The respondents' contention is that the date of decision is 6 April 2017 and not 12 April 2016. However, the punishment of salary deduction had been implemented against the applicant consequential to the first respondent's decision on 12 April 2016. In these circumstances of two decisions on two different dates, a literal construction of reg. 41(2) above-mentioned is of little, if any assistance to determine the effective date of punishment.

[41] The same issue that the date of punishment can be construed from the date of decision as stated in the Regulations was raised before the Court of Appeal in the case of *Owi Cheng Ian v. Suruhanjaya Pasukan Polis Diraja Malaysia & Ors* [2014] 8 CLJ 559. The necessity to state an effective date of punishment was endorsed by the Court of Appeal in the case of *Owi Cheng Ian* (*supra*). The pertinent facts of the case were that the appellant, a chief inspector, had been dismissed from the police force. One of the issues raised by the appellant was the failure of the respondent to adhere to procedural requirements, *inter alia*, by their failure to state the date of the commencement of the decision in the "Pemberitahuan Hukuman Tatatertib", the pertinent portion of which is reproduced below:

> Dengan hormatnya saya memaklumkan bahawa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke-74 pada 11.3.2009 selepas menimbang surat representasi tuan bertarikh 20.1.2008 dengan teliti dan saksama telah membuat keputusan seperti berikut:
>
> (a) Tuan didapati bersalah dan dikenakan hukuman Buang Kerja Mengikut Peraturan 38(o) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan) 2002 bagi pertuduhan pertama.

[42] It is worthy of note that the appellant in *Owi Cheng Ian* (*supra*) was charged under the same Regulations as in the instant case, ie, Public Officers (Conduct and Discipline) Regulations 1993. The same issue on the absence of a date of effective punishment was raised which the learned High Court Judge had construed as the date of decision, as stated in the Regulations. Nevertheless, Abdul Wahab Patail JCA (as he then was), who delivered the decision held that the relevant Disciplinary Authority must state clearly the date of commencement of punishment as, *inter alia*, it has financial implications, (as in the instant case). His Lordship had stated as follows:

> [21] The appellant was served with a copy of the letter nearly two months later on 6 May 2009. Although this third issue was specifically raised by the appellant at para. 10(f) of his affidavit dated 30 May 2009, it was not addressed in the affidavit in reply. The High Court held that the date of termination operates from the date of the decision. With respect, the High Court erred in stopping at that determination. The point is that the determination was made upon litigation. No further litigation should become necessary to determine the details of an order of a disciplinary authority. *The point raised is that the Pemberitahuan Hukuman Tatatertib ought to have stated it clearly, reflecting the decision of the disciplinary authority precisely as to when it intended the punishment of dismissal to operate from. It is also important as it impacts upon the payments, if any, the appellant was entitled to receive or even to refund. Such date cannot be assigned by other than the disciplinary authority. Without the date of dismissal being specified, the dismissal was incomplete and, therefore, defective.* (emphasis added)

[43] The principle in *Owi Cheng Ian* (*supra*) also applies to the facts of the instant case before us where there is uncertainty in the effective date of punishment on the second charge as a result of two separate decision dates of the first respondent. The consequence to the applicant is that the implementation of the punishment of the applicant's salary deduction by three salary scales from 12 April 2016 was therefore unlawful. This cannot be dismissed as a mere irregularity which can be easily rectified by making necessary salary adjustments to comply with the Regulations.

[44] We note that the respondents did not dispute the above contention of the applicant that the implementation of the reduction of three salary scales was effected as a result of the first respondent's decision on 12 April 2016 instead of the subsequent decision on 6 April 2017. In response, learned Federal Counsel had forwarded the argument that the implementation and

execution of the first respondent's decision in respect of the second charge, which was affirmed by the second respondent is the function of the Public Service Department and the related Ministry, and was thus removed from the exercise of the powers of the first and second respondents. It was contended further that on this premise, the implementation and execution of the said punishment against the applicant is not within the purview of the first and second respondents.

[45] Learned Federal Counsel had stated the following in her written submissions dated 21 January 2020 at paras. 44 to 47 reproduced as follows:

> It is respectfully submitted that the finding of guilt and punishment with respect to the 2nd charge is not rendered defective by the irregularity (if any) in the implementation of the punishment imposed by the Disciplinary Board which was affirmed by the Disciplinary Appeal Board.
>
> As submitted earlier, the implementation of the punishment is a distinct and separate administrative exercise which does not fall within the purview of the Disciplinary Board and the Disciplinary Appeal Board pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 [P.U.(A) 395/1993].
>
> The Disciplinary Board and the Disciplinary Appeal Board is rendered *functus officio* once a decision is delivered.
>
> In this instance the learned Judge was correct in holding at [40] and [41] of page 24 RRT that it is the function of the Public Service Department and the related Ministry to implement and execute the decision and in the event there is any irregularity it does not affect the validity of the decision arrived at by the Disciplinary Board and the Disciplinary Appeal Board.

[46] The argument of learned Federal Counsel above stated appears to distance the implementation of the punishment from the decisions of the Disciplinary Board and Disciplinary Appeal Board which had meted the punishment. However, this ingenious argument fails to take into consideration that the resulting effect of an erroneous and wrongful implementation of the punishment in question was directly attributable to the failure of the second respondent to set aside the punishment of the reduction of three salary scales on the second charge in the earlier proceedings of the first respondent when the second respondent made the decision to remit the second charge for re-consideration by the first respondent. It is all too easy and too convenient for learned Federal Counsel to take the position to distance the implementation of the punishment of reduction of three salary scales for 36 months from the purview of the first and second respondents by treating it as a purely administrative matter.

[47] We note that in *Owi Cheng Ian* (*supra*), the Court of Appeal had stated in clear and succinct terms that it was the duty of the Disciplinary Authority to state when it intended the punishment of dismissal to operate and that "Such date cannot be assigned by other than the disciplinary authority".

[48] For all the reasons stated above, we are of the considered view that there are serious procedural improprieties in the decision-making process of the first and second respondents that warrant appellate intervention. To summarise: there was admitted discrepancy by the first respondent in the punishment on the second charge as recorded in the first respondent's notes of proceedings and the punishment informed to the applicant by letter. When the second respondent discovered the discrepancy and remitted back the second charge to be re-considered by the first respondent, the second respondent had failed to set aside the punishment on the second charge in the earlier proceedings before the first respondent. As a consequence, the punishment of reduction of three salary scales subsisted and was implemented against the applicant since 12 April 2016. The first respondent subsequently imposed the same punishment by its decision dated 6 April 2017. This was affirmed by the second respondent on 19 March 2018. Thus, there were two commencement dates of punishment imposed in respect of the same punishment and the same charge. No evidence was tendered by the respondents that the deductions of salary that was wrongfully made against the applicant has been refunded. In effect and in practical terms the applicant was subjected to two punishments for the same charge.

[49] It would be a gross injustice to treat these serious procedural improprieties as mere irregularities that can be rectified by suitable financial adjustment, or to attempt to absolve the respondents of its public duty to act fairly by the argument that the implementation of the punishment is the function of the Public Service Department and the related Ministry, and removed from the exercise of the powers of the first and second respondents, and thus was not within the purview of the respondents.

[50] We would like to emphasise here that in exercising public functions against the individual, public bodies have a duty to act fairly in substance as well as procedure and courts have to be vigilant to ensure that might does not become right. More than 40 years ago, the late Raja Azlan Shah CJ (Malaya) (as HRH then was) had made the following observations in the celebrated case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, which observations still ring true today. His Lordship stated:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen, so that the

courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place" (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434, 442).

[51] For all the reasons stated above, we were unanimous in our view that there were serious procedural improprieties by the second respondent in the failure to set aside the punishment on the second charge on remitting the second charge for re-consideration by the first respondent and the failure of the respondents to specify an effective date of said punishment which had led to wrongful deductions to the applicant's salary. We are of the considered view that these are serious procedural improprieties that have tainted the fairness and justice of the proceedings.

[52] We therefore allowed the appeal and the prayers of the applicant as stated in para. 2(a), (b), (c) and (d) of the applicant's judicial review application under O. 53 of the Rules of Court 2012. In particular, we allowed the following reliefs:

(i) an order of *certiorari* to quash the decision of the Disciplinary Board for the Managerial Group (No. 1) (Disciplinary Board) dated 6 April 2017, which found the applicant guilty of a disciplinary misconduct and imposed the punishment of a salary reduction of three salary scales for a period of 36 months; and/or

(ii) an order of *certiorari* to quash the decision of the Disciplinary Appeal Board, Public Service Commission (Disciplinary Appeal Board) dated 19 March 2018 which affirmed the decision of the Disciplinary Board on 6 April 2017.

[53] We also awarded costs of RM20,000 to the applicant/appellant subject to allocatur.